IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

AMERICAN WASTE MANAGEMENT AND RECYCLING, LLC. *Plaintiff* **v.** **CEMEX PUERTO RICO; ET AL.** *Defendants*	**CASE NO. 07-1658 (JAF)**

DEFENDANT ECOTERRA'S MOTION TO DISMISS AND MEMORANDUM OF LAW

TO THE HONORABLE COURT
CHIEF JUDGE JOSE A. FUSTE:

COMES NOW, Defendant CANOPY ECOTERRA CORP. (hereinafter "ECOTERRA") through the undersigned counsel, reserving all defenses, including improper service of process and lack of personal jurisdiction, and very respectfully state and pray as follows:

I. Introduction

On July 23, 2007, Plaintiff, American Waste Management and Recycling, LLC. (hereinafter "AWMR"), presented the captioned Complaint claiming breach of contract, collection of monies and damages. Defendant Ecoterra, moves to dismiss the Verified Complaint filed by AWMR pursuant to Federal Rule of Civil

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Procedure 12(b)(1) & (2). Specifically, AWMR lacks standing to bring the present suit inasmuch as state law bars a foreign corporation from initiating any action in the Commonwealth when said corporation has conducted business in Puerto Rico without being authorized to do so.

II. Standard of Review for Motion to Dismiss for Lack of Standing

A defendant may move to dismiss an action for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2) or for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). Since the justiciability requirement of standing is generally viewed as a component of subject matter jurisdiction, *see, e.g., Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1280-81 (1st Cir. 1996), standing challenges are more appropriately brought under Fed.R.Civ.P. Rule 12(b)(1). *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362-63 (1st Cir. 2001) [stating justiciability issues should be analyzed under Rule 12(b)(1)]. Accordingly, this Court evaluates a motion to dismiss under the standard for motions brought pursuant to Rule 12(b)(1). As courts of limited jurisdiction, federal courts have the duty of narrowly construing jurisdictional grants. *See, e.g., Alicea-Rivera v. SIMED*, 12 F.Supp.2d 243, 245 (D.P.R. 1998). Motions brought under Rule 12(b)(1) are subject to the same standard of review as Rule 12(b)(6) motions. *Negron-Gaztambide* *v. Hernandez-Torres,* 35 F.3d 25, 27 (1st Cir. 1994); *Torres Maysonet v. Drillex, S.E.,* 229 F.Supp.2d 105, 107 (D.P.R. 2002). Under Rule 12(b)(6), dismissal is proper "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Gonzalez-Morales v. Hernandez-Arencibia,* 221 F.3d 45, 48 (1st Cir. 2000) [*quoting Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 52 (1st Cir. 1990)].

III. Memorandum of Law

A. Dismissal is appropriate based on Puerto Rico's General Corporations Act door-closing statute.

The Puerto Rico General Corporations Act of 1995 ("GCA"), *14 L.P.R.A. §§2601 et seq.*, bars any action commenced by a foreign corporation which has illegally engaged in business transactions in the Commonwealth without being authorized to do so.

In its pertinent section, the GCA provides that:

> (a) A foreign corporation shall not do business in the Commonwealth until it receives authorization to do so pursuant to the procedures provided by this subtitle.
>
> (b) In addition to complying with the requirements to do business in the Commonwealth pursuant to the procedures provided in this subtitle, foreign corporations engaged in banking or the securities business, or insurance (including reinsurance) or any other business regulated by law in a particular manner, before doing business in the Commonwealth, shall comply with any particular requirement provided by the laws regulating such industries. Article 13.02, *14 L.P.R.A. §3162.*

Furthermore, Article 13.03 of the GCA states that, as a consequence of conducting business in Puerto Rico without the proper certificate of authorization, any foreign corporation "may not initiate any proceeding in any court of the Commonwealth until it obtains such certificate." *14 L.P.R.A. §3163(a)*.

The sole plaintiff in this case, AWMR, invoked the jurisdiction of this Court based exclusively on diversity of jurisdiction pursuant to *28 U.S.C. §1332*. See Verified Complaint, Dkt. 1, ¶1, page 1. Consequently, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), is controlling which means that, being a diversity suit, the federal court must apply and follow local law.

By reason of the policies expressed in *Erie*, the United States Supreme Court held in *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), that a federal court sitting in diversity must apply a state door-closing statute barring an unregistered foreign corporation from bringing suit in the state courts and, hence, dismiss an action brought by a foreign corporation in the federal court. The facts in *Woods* are generally similar to the facts of the present suit with regards to this door-closing statute argument. In *Woods* a nonresident corporation brought an action in a Federal District Court solely on the grounds of diversity of citizenship. Defendant moved for summary judgment on the ground that plaintiff had not qualified to do business in the State under a statute that provided that a foreign corporation failing to comply with the requirements of state law shall not be permitted to bring or maintain any action or suit in any of the courts of the State. The United States Supreme Court reversed the Circuit Court's decision which, in turn, had reversed the District Court's previous dismissal of the case. According to the Supreme Court,

> "... since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-109 (1945); *Woods*, 337 U.S. at 538.

In other words, where "one is barred from recovery in the state court, he should likewise be barred in the federal court" whenever federal jurisdiction is based exclusively on diversity of citizenship. *Woods*, 337 U.S. at 538.

Woods' holding -that a state's rule barring an action from proceeding in its courts must be applied to bar the action from the federal court- has been cited with approval by the United States Court of Appeals for the First Circuit. See *Feinstein v. Massachusetts Gen. Hosp.*, 643 F.2d 880, 888 (1st Cir. 1981) [stating that Erie policies requiring adherence to state door-closing statutes likewise require a federal court to apply state-created administrative limitations on rights to recovery) (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)]; and *Construction Aggregates Corp. v. Rivera de Vicenty*, 573 F.2d 86, 96 (1st Cir. 1978) (holding that if Puerto Rico does not give its own courts jurisdiction over a claim collaterally attacking workers' compensation rates for locally hired workers, a federal court cannot exercise diversity jurisdiction over the claim). The ruling has also been followed by this Honorable Court in a case that involved a provision of the forerunner Puerto Rico Corporation Law. See, *Tel-Pic Syndicate, Inc. v. Station WIBS*, 94 F.Supp. 888 (D.P.R. 1951) [holding that plaintiff, being engaged in doing business in Puerto Rico without having qualified to do so under the provisions of the Corporation Law of Puerto Rico, was barred from maintaining a suit to enforce a contract (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)]; and more recently with regards to the current GCA. See, *Sumitomo Real Estate Sales (N.Y.), Inc. v. Quantum Development Corp.*, 434 F.Supp.2d 93 (D.P.R. 2006) (holding that the door-closing statute, which denies standing to any foreign corporation doing business in the Commonwealth without a certificate of authorization from the Department of State, was applicable in action in federal court on basis of diversity jurisdiction, in light of *Erie's* twin aims, where the statute would bar recovery in a state court). As in *Sumitomo*, the present Verified Complaint was not one arising under federal law, but rather a suit based solely on diversity jurisdiction, as AWMR is, as established, a foreign corporation.

Based on the abovementioned, the present Complaint should be dismissed. AWMR is a foreign corporation not authorized to conduct business in Puerto Rico. See Exhibit 1, Negative Certificate from the Department of State of the Commonwealth of Puerto Rico, dated August 17, 2007. By its own admissions, AWMR engaged in business transactions in Puerto Rico with Ecoterra by entering into a "'Purchase Contract for the Purchase of Scrap Metal, Alloys, and Other Items' [...] including ferrous and non-ferrous metals and all alloys resulting from the harvesting and dismantling of the [...] structures located at the premises of the CEMEX plaint in Ponce, Puerto Rico". See Verified Complaint, Dkt. 1, ¶15, page 3. By entering into said Purchase Contract, AWMR violated Article 13.02(a) of the General Corporations Act, which clearly required it an authorization in order to do business in the Commonwealth.[1]

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1 At this time, Ecoterra will not discuss the probability that AWMR may also have violated Article 13.02(b) of the General Corporations Act for any other statutory requirements that should have been complied with by AWMR for the work subject of the Purchase Contract it had with Ecoterra.

Seeing that this suit is one in diversity and AWMR is barred from invoking the protection of Puerto Rico law in the Commonwealth courts, AWMR is also barred from invoking those protections in federal court. *Woods*, 337 U.S. at 538. AWMR has no standing to initiate the above-captioned Verified Complaint in the Commonwealth courts and it certainly cannot try to circumvent that reality by presenting its suit in federal court. Thus, the only recourse for this Honorable Court is to dismiss the case in its entirety.

As this Honorable Court has duly recognized, "a contrary holding would result in discrimination among citizens of the state in favor of those authorized to invoke the diversity of the federal courts." *Tel-Pic Syndicate, Inc. v. Station WIBS*, 94 F.Supp. at 891 (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949)).

WHEREFORE, Ecoterra respectfully requests that this Honorable Court move to DISMISS WITH PREJUDICE the captioned Verified Complaint imposing upon Plaintiff reasonable attorney's fees in favor of Defendants for what has been at all times an obstinate conduct from AWMR.

I hereby certify that on August 23, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

RESPECTFULLY SUBMITTED. At San Juan, Puerto Rico, this 23rd day of August, 2007.

S/ ANTONIO VALIENTE

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